Trust Corporation has with some merit attempted to distinguish the facts of that case where leave was (but should not have been) given for a writ of possession to issue and the facts of this case where possession is asked for only until the trial of the action, in my judgment, the proposition of counsel for Rampai Muda is in the present circumstances academic in view of the uncontradicted fact that Rampai Muda has actually ceased running the Hospital since July 18, 1986, and has to all intents and purposes abandoned it whatever the reason. In view of all these considerations, I make an order in terms of all the prayers except that, because of the obvious typographical error in prayer (iii), the costs of this application will be paid by Rampai Muda to the Trust Corporation.

Order accordingly.

Solicitors: *Skrine & Co.; Syarikat Joginder Singh.*

Re HONG HUAT REALTY (M) SDN. BHD. UNITED ASIAN BANK BHD. v. HONG HUAT REALTY (M) SDN. BHD.

[O.C.J. (Shankar J.) October 11, 1986]

[Johore Bahru – Companies Winding-up No. 42-41 of 1986]

Company Law – Winding-up – Petition by secured creditor – Company unable to pay debt – Commercial insolvency – Directors' personal guarantee – Company opposing petition – Grounds – Supporting creditors – Whether petition should be granted – Companies Act, 1965, s.218 – National Land Code, ss. 254 & 256(3).

In this petition, the petitioner ("the Bank") seeks to wind-up the respondent company which was incorporated on February 14, 1972, with a paid up capital of $560,002. The company through its current account was granted by the Bank overdraft facilities secured by charges on 3 lots of land and a deposit of title deed on another lot. The Bank held a personal guarantee from each of the company's 3 directors and a fixed deposit from the company of $1.2 million. On March 26, 1982, the company's overdraft account was reduced from about $1.8 million to $544,639.56 by the application of the fixed deposit plus accrued interest of $1,256,523.23. The account became stagnant after that. By February 27, 1986, the amount owing to the Bank had swollen to $1,028,453.02 ("the debt").

On February 13, 1984, the Bank served a notice of default in respect of 2 of the lots of land, and invoked section 254 of the National Land Code, 1965, but the sale did not materialize. On April 1, 1986, the Bank issued the statutory notice in accordance with the provisions of the Companies Act, 1965, to the company for payment of the debt within 21 days. The debt was not paid, and the petition was filed and advertised, attracting the attention of the company's other creditors who gave notice of their intention to appear at the hearing which eventually took place on September 24, 1986.

The company was involved in 2 housing projects, the Saling Project and the Taman Nora Housing Project. It had charged Lot 1169, Mukim of Senai/Kulai to Asiavest Merchant Bankers (M) Bhd. for $2 million, and Lots 212 and 213, Mukim of Plentong, to the same chargee for $4 million. It would appear that these properties had been encumbered *in futuro* by way of an assignment and a charge in escrow in favour of Perwira Habib Bank (M) Bhd. for $11.5 million. After the petition was advertised, the law firm of Wong & Paramjothy, claiming to act for all the 537 purchasers in the 2 housing project, filed notice of its intention to appear on the petition, but it did not appear in court. A large number of the company's creditors supported the petition, which was opposed only by the company which advanced 3 grounds why the petition should be dismissed, *viz.* (a) the debt was disputed, (b) in these times of depressed economic circumstances and acute recession, the courts should no longer permit lenders a free hand in enforcing their legal remedies, and (c) to permit the petition to proceed would be to allow a multiplicity of proceedings which was tantamount to abuse of process.

Held, granting the petition: (1) there were no merits in the submissions made on behalf of the company;

(2) evidence of commercial and actual insolvency in this case was overwhelming;

(3) costs of the petitioning creditor and supporting creditors must be paid by the company.

Cases referred to:

(1) *Ng Ah Kway* v. *Tai Kit Enterprise Sdn. Bhd.* [1986] 1 M.L.J. 58.
(2) *Re Bryant Investment Co. Ltd.* [1974] 2 All E.R. 683.
(3) *Stonegate Securities Ltd.* v. *Gregory* [1980] 1 All E.R. 241.
(4) *NKM Development Sdn. Bhd.* v. *Irex Sdn. Bhd.* (1985) *Pillai* Sourcebook 2nd Ed. p. 1239.
(5) *F.J. Reddacliffe & Associates Pty. Ltd.* v. *Arc Engineering Pty. Ltd.* (1978) 3 A.C.L.R. 426.
(6) *Ng Yik Seng & Anor.* v. *Perwira Habib Bank (M) Bhd.* [1980] 2 M.L.J. 83.
(7) *Kheng Soon Finance Bhd.* v. *M.K. Retnam Holdings Sdn. Bhd. & Ors.* [1983] 2 M.L.J. 384.
(8) *Tengku Farid bin Tunku Hussain & Ors.* v. *United Asian Bank Bhd.* [1985] 2 M.L.J. 199.
(9) *Bank Bumiputra Malaysia Bhd.* v. *Esah binti Abdul Ghani* [1986] 1 M.L.J. 16.
(10) *Moor* v. *Anglo-Italian Bank* (1879) 10 Ch. D. 681.
(11) *Re Borough of Portsmouth Tramways Co.* [1892] 2 Ch. D. 362.
(12) *Malayan Plant (Pte) Ltd.* v. *Moscow Narodny Bank Ltd.* [1980] 2 M.L.J. 53, 54.
(13) *White & Carter (Councils) Ltd.* v. *McGregor* [1962] A.C. 413.

(14) *Clea Shipping Corporation* v. *Bulk Oil International Ltd.* [1984] 1 All E.R. 129.
(15) *Re Camburn Petroleum Products Ltd.* [1979] 3 All E.R. 297, 303.
(16) *Verschures Creameries Ltd.* v. *Hull and Netherlands Steamship Co. Ltd.* [1921] 2 K.B. 608.
(17) *Benjamin Scarf* v. *Alfred George Jardin* (1882) 7 H.L. (E) 345.

PETITION.

Tan Jin Wah for the petitioner.
Subra Naicker for the respondent.

Cur. Adv. Vult.

Shankar J.: This is a petition by United Asian Bank Berhad (hereafter referred to as 'the Bank') to wind-up Hong Huat Realty (M) Sdn. Bhd. ('the Company').

The Company was incorporated on February 14, 1972, with a paid up capital of $560,002/-. In the course of its business activities it opened a current account No. 05-059 with the Bank. Through that account the Company obtained overdraft facilities. For these facilities the Company offered collateral by way of a charge for $400,000/- on the land comprised in EMR 185 for Lot 1536 and EMR 187 for Lot 1538 in the Mukim of Senai/Kulai valued at the time at about $500,000/-. There was also a separate charge for $100,000 on the land comprised in EMR 13 Lot 52 in the Mukim of Kahang valued at about $293,000. There was also a deposit of title deed under Johore Government Grant No. 9279 Lot 2799 for $40,000/-. The Bank also held a personal guarantee from each of the Company's directors, Dato Yap Sing Hock, Yap Seng Chang and A. Hamid bin Mohamed Tahir for $400,000/-. And the Bank held a fixed deposit from the Company of $1.2 million.

In the usual course of its business, the Bank sent monthly statements to the Company. By February 1982 the overdraft in the Company's account stood at $1,801,167.79. On March 26, 1982, this figure was reduced by the application of the fixed deposit plus accrued interest of $1,256,523.23 to reduce the overdraft to a figure of $544,639.56. For all practical purposes the account became stagnant after that. Monthly statements continued to be sent. The interest continued to mount. Nothing was paid in. By February 1986 the amount due had swollen to $1,028,453.02.

Shortly after the application of the fixed deposit to the reduction of the overdraft in March 1982 some correspondence was exchanged between the Company and the Bank. This related to the interest rate applicable. But the queries appear to have been resolved by a personal meeting between the Bank and one of the Company's Directors, one Francis Ng. The Company did not dispute a letter sent by the Bank to the Company's auditors on September 14, 1983, in which it was certified that at the close of business on September 30, 1982, the debit balance was $616,233.85.

On February 13, 1984, the Bank served a notice of default with respect to the charge relating to EMR 185 and 187 aforesaid. The notice states that the debt outstanding as at November 30, 1983, was M$735,034.76 and that further interest was accruing at the rate of 13.75% per annum with monthly rests. Section 254 of the National Land Code was invoked and in the event of failure to pay up the debt within 7 days, notice was given that the Bank proposed to apply for an order of sale. This was done through the Collector's office but the sale did not materialise.

The debt and the interest continued to mount and by February 27, 1986, it stood at M$1,028,453.02 ('the Debt').

On April Fool's day 1986, the Bank through its Solicitors issued the statutory notice in accordance with the provisions of the Companies Act, to the Company for the payment of the Debt within 21 days failing which the Company would be deemed to be unable to pay the Debt and action would then be taken for the winding-up of the Company. A copy of this notice was sent to each of the directors of the Company.

The debt was not paid. The petition was filed. It was advertised. This attracted the attention of the Company's other creditors who gave notice of their intention to appear at the hearing which eventually took place on September 24, 1986.

The Company was involved in two housing projects. One was known as the Saleng Project and the other as the Taman Nora Housing Project. From the results of searches made in the Companies Registry and filed by the Bank in these proceedings, it appears that the Company had charged the land comprised in Grant No. 3951 for Lot No. 1169 in the Mukim of Senai/Kulai, Johore Bahru in favour of Asiavest Merchant Bankers (M) Bhd. for $2 million. These monies were to be released by way of end financing by Development and

Commercial Bank, Kulai. The Company had also charged the land comprised in EMR Nos. 211 and 212 for Lots 212 and 213 in the Mukim of Plentong to Asiavest Merchant Bankers (M) Bhd. for $4 million. It would appear that these properties had been encumbered *in futuro* by way of an assignment and a charge in escrow in favour of Perwira Habib Bank (M) Bhd. for $11,500,000.00.

From the sale and purchase agreement relating to these housing projects, it would appear that the law firm of M/s Wong & Paramjothy were concerned in their preparation and execution. After the petition was advertised, this firm filed a notice dated July 14, 1986, of their intention to appear on the petition. They claimed to be acting for all the purchasers named in the Schedule attached to the notice. This Schedule is in two parts. The first lists 230 purchasers in the Taman Saleng Project and the second part lists 307 purchasers in the Taman Nora Project. Mr. Tan Jin Wah who appeared for the petitioners at the hearing submitted that this list must have been supplied to M/s Wong & Paramjothy by the Company and that in fact M/s Wong & Paramjothy, in the absence of evidence to the contrary, must be presumed to have had no instructions to act for the purchasers in question. Whilst this Court is not prepared to go that far, the fact remains that at the time of the hearing M/s Wong & Paramjothy did not appear in Court. Nor did a single one of the purchasers listed in this Schedule appear to oppose the petition. Indeed as Mr. Tan pointed out, a substantial number of the persons listed in the Schedule supplied by M/s Wong and Paramjothy, appear as supporting creditors in lists which have been filed by the other Solicitors who stood up to be counted as supporters of the petition for the winding-up when it was called on for disposal. There were 9 such Solicitors and a simple addition of those of them who chose to quantify their claim resulted in a total of approximately M$1.25 million. Some of them were unpaid creditors for goods sold and delivered to the Company. A preponderant number of the supporting creditors were purchasers in the two housing projects who had unsatisfied claims against the Company for statutory compensation under the Housing Developers Act for late delivery. A large number of them had in fact already obtained judgments against the Company and these had not been satisfied.

In the result, the only voice that was heard in opposition to this petition was from the Company itself represented by its Solicitors M/s Gan & Lim and Mr. Subra Naicker of Counsel, who advanced three grounds why the petition should be dismissed.

First, it was contended that the debt was disputed, and could therefore not properly be made the subject matter of a winding up petition. He relied on my previous decision – *Ng Ah Kway* v. *Tai Kit Enterprise Sdn. Bhd.*[1] The distinction between that decision and the facts in the present case is that the debt there was not a liquidated sum. It was a claim by a building contractor for the cost of works he had carried out, the value of which was seriously disputed. *Re Bryant Investment Co. Ltd.*[2] was also relied upon. But in that case there was a serious dispute as to whether the debt was in fact due on the date when the statutory demand was made. Another case cited was *Stonegate Securities Ltd.* v. *Gregory.*[3] The statutory demand in that case was for £33,000 which the petitioner alleged was due to him from the company. The company denied that it presently owed him £33,000 or any part of that sum. In other words, the entire debt was disputed. The court held on the facts before it that there was a *bona fide* dispute whether the money claimed was presently due and granted an injunction restraining the claimant from presenting a petition for the winding-up of the company.

I fully agree with counsel for the Company that a winding-up petition should not be used as a means for resolving disputes which ought to be settled in ordinary litigation. I have taken note of *NKM Development Sdn. Bhd.* v. *Irex Sdn. Bhd.*[4] an unreported decision by V.C. George J. which is digested in the *Sourcebook of Malaysian and Singapore Company Law (1986)* by Philip N. Pillai, and *F.J. Reddacliffe & Associates Pty. Ltd.* v. *Arc Engineering Pty. Ltd.*[5] where Needham J. held that the processes for the winding-up of companies are not designed to take the place of actions at law for the determination of the liability of guarantors or persons who received goods on sale.

But this is not that kind of a case. There is no *bona fide* dispute of the Debt. In fact both Counsel for the Company and Mr. Gan have said in so many words that the Company is prepared to admit that it owes the Bank about M$0.5 million. But they were unable to give any indication as to when the Company would be in a position to pay even this amount. Furthermore the crux of the case is whether the Company is solvent. Two points will serve to settle that issue. In the first place if the Company was solvent, it would have a simple

matter for it to file a certified balance sheet to show that its assets exceeded its liability and that it had ready money to pay its debts as and when they fell due. The fact that this evidence was not made available must result in an adverse inference being drawn against the Company. Secondly, there was a preponderance of evidence that the money claimed by the Bank was in fact due and owing. One must remember that month after month the Bank here had been sending statements of the Company's indebtedness. If a defendant denies that he owes money, the denial must condescend on particulars. But here was a case where the denial was not only bare, it was also barren in the sense that absolutely no material was furnished to pinpoint in what manner the Bank had claimed more than its rightful due.

In dealing with the definition of commercial insolvency, Mr. Tan drew my attention to the passage appearing at page 534 of *Buckley* – Companies Act 1948 (14th Edition). With respect I would venture to state that the words in question deserve the strongest emphasis:

"The particular indications of insolvency mentioned ... are all instances of commercial insolvency, that is, of the company being unable to meet current demands upon it. In such a case it is useless to say that if its assets are realised there will be ample to pay 20 shillings in the pound; this is not the test. A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realisable; but although this be so, yet if it have not assets available to meet its current liabilities, it is commercially insolvent and may be wound up."

In all the circumstances it is the view of this Court that the first ground is devoid of merit.

The second ground which was advanced for the Company was indeed a most interesting one. What was submitted was that in these times of depressed economic circumstances, and acute recession, the Courts should no longer permit lenders a free hand in enforcing their legal remedies. So it was contended, that where there was genuine hardship which would make the enforcement of legal remedies a useless piece of litigation, equity should intervene to relieve the debtor and to rein the creditor.

With respect to Counsel for the Company, this submission is somewhat novel, and I propose to deal with the cases in chronological sequence. *Ng Yik Seng & Anor.* v. *Perwira Habib Bank (M) Bhd.*[6] was a case where the bank held by way of collateral security for its overdraft a charge on a piece of property and also a personal guarantee from two directors of the debtor company. Instead of realising the charge first, the bank sued the guarantors. Delivering the judgment of the Federal Court, Chang Min Tat F.J. said at page 84:

"The amount outstanding on the overdraft was only $251,091.64. *Prima facie*, therefore, the realisation of the charge would more than repay the overdraft. In these circumstances the appellants contended that "in law and equity" they should only be called on to meet their guarantee if there should be any deficit, after the sum to be realised from the sale of the charged property had been determined. This contention is not without attraction. We have not heard any substantial submissions at length on this point which was not ruled on in the court below, but while it is uncertain that the claim against the appellants in the circumstances of a charge is bad "in law and equity," it is, in our view, clear that in such circumstances an action to obtain judgment against the guarantors which would open avenues of execution to the chargee and even bring the guarantors into the Bankruptcy Court when in the final accounting, the appellants needed not to be called to honour their guarantee, would be an abuse of the process of the courts. Where the plaintiff had no substantial interest in the subject of the litigation, had suffered no damage which could not easily be rectified and the action was a useless piece of litigation, the court dismissed it: see *Webster* v. *Bakewell R.D.C. (No. 2)*. That was a case where the facts were present at the issue of the writ. The present case may not be so but may well turn out to be effectively a case of, to echo the words used, a useless piece of litigation, so that a court may very well in the exercise of its discretion stay, not dismiss, the action until after the completion of the sale of the property that had been charged to the Bank. A stay (or even dismissal) of proceedings may "often be required by the very essence of the justice to be done," per Lord Blackburn in *Metropolitan Bank* v. *Pooley*, so as to prevent parties being harassed and put to expense by frivolous vexatious or hopeless litigation. See also *Riches* v. *Director of Public Prosecutions, per* Lawton L.J. at pages 1027 and 942 of the respective reports in [1973] W.L.R. and [1973] 2 All E.R. 935."

The next case was *Kheng Soon Finance Bhd.* v. *M.K. Retnam Holdings Sdn. Bhd. & Ors.*[7] There the lender had agreed to finance a housing development with full knowledge that houses to be built on the land which was to be the subject matter of the charge, had already been sold to an army of sub-purchasers. It was a term of the contract between the lender and the housing developer that the loan would be released progressively upon payment of the housing developer's architect's certificates. The housing developer was obliged to service the interest by monthly instalments. This he did not do. The lender thereupon refused to honour the developer's architect's certificates. The development then came to a standstill and the lender sought to enforce the charge by applying to court for an order of sale. This was refused because "on an application for sale of the land charged the court has not only to apply the law but also to

invoke the aid of equity in order to be satisfied whether a cause to the contrary has been shown or not in accordance with section 256(3) of the National Land Code. The chargee must not only come to court with proof that the chargor has defaulted, but also with proof that the chargee himself is free of fault and that he was not guilty of any unreasonable conduct, and that there was no right of innocent third parties to be affected by the order." In the circumstances of that case, the Federal Court held that the sub-purchasers of the building lots had acquired equities to the land and that the sale order sought by the finance company should be refused because its conduct had been unreasonable.

The third case cited was *Tengku Farid bin Tunku Hussain & Ors.* v. *United Asian Bank Bhd.*[8] This was also a housing development which had failed. Initially the bank had sued the developer company for the total debt. But subsequently the bank initiated proceedings against the guarantors who applied to court to stay the proceedings against them until after the bank had foreclosed the charges in its favour and realised their securities against the company. That application was refused in the first instance and on appeal the Federal Court held that although the guarantor has an equity against the creditor, if he can show that the creditor is attempting to place the whole burden of the debt unfairly upon him, in the instant case the lands which were charged as security for the loan had already been sold to sub-purchasers who had equities. Between the equities of the guarantors and the sub-purchasers the Court held that its duty was to protect the sub-purchasers as innocent parties and the bank was entitled to proceed to recover the indebtedness from the guarantors.

As against these authorities, Mr. Tan Jin Wah, counsel for the Bank, drew the attention of the Court to *Bank Bumiputra Malaysia Berhad* v. *Esah binti Abdul Ghani*[9] This is also a decision of the Supreme Court. The judgment makes it quite clear that *Ng Yik Seng & Anor.* v. *Perwira Habib Bank Malaysia Bhd.* was not only not followed but was not regarded as binding authority. The other two cases, just referred to, were not cited to the Supreme Court. Here, too, the bank had lent money to a principal debtor and as security had taken a charge over land belonging to the principal debtor and two others. By way of further security the bank had also obtained a guarantee from Esah binti Abdul Ghani. When the debt was not paid, the bank in the first instance initiated foreclosure proceedings. Upon the death of one of the owners of the land, the bank did not proceed with the foreclosure proceedings. Instead it obtained judgment against the principal debtor and the guarantor and then filed a bankruptcy notice against the guarantor to pay the amount owing. The guarantor failed to do so. The bank filed a creditor's petition. The guarantor applied for a stay. In the court of first instance the judge castigated the bank for going after the guarantor before it had exhausted its other remedies. But the Supreme Court held that the charge and the guarantee were merely collateral security and that the guarantor has no special right to demand that the creditor called upon the principal debtor to pay off the debt before asking the guarantor to pay. In other words, everything else being equal, it does appear that the guarantor has no equity which he can invoke to postpone his exposure to liability.

How do these decisions affect the present case?

Mr. Subra Naicker is contending that the Bank must first complete its foreclosure proceeding and only then sue the Company.

But Counsel for the Bank, in addition to inviting my attention to the judgment of the Supreme Court in *Bank Bumiputra Malaysia Bhd.* v. *Esah binti Abdul Ghani (supra)* also relied upon *Moor* v. *Anglo-Italian Bank*[10] where it was held that there is no mode in a winding-up of applying the bankruptcy rule that a petitioning creditor with a secured debt must either give up or value his security, in the latter case proving for the difference as there are no means of knowing before the winding-up whether the company is insolvent or not.

The insolvency just referred to must, of course, be actual insolvency, as opposed to commercial insolvency.

He also relied on the passage appearing in *Buckley* at page 539 which reads:

"A secured creditor may present a petition, and he does not by presenting one, elect to give up his security or in anyway lose his right to it. Where a mortgagee who has presented a winding-up petition gives notice of intention to exercise his power of sale in his mortgage, he may be restrained from so doing pending the hearing of the petition ..."

"But a secured creditor be his security what it may, is a creditor. He can recover judgment. And if he presents a winding-up petition, there would seem to be no reason why

by exercising his remedy as a secured creditor he should be deprived of his right to a winding-up order."

Re Borough of Portsmouth Tramways Company[1] is the case which supports the last proposition.

Each of the cases cited by counsel for the Company involves the foreclosure of a charge which brought into play section 256 of the National Land Code which reads:

"(3) On any such application, the Court shall order the sale of the land ... to which the charge relates unless it is satisfied of *the existence of cause to the contrary.*"

Mr. Tan was at pains to point out that this is a petition for winding-up. He cited the passage appearing in *Buckley* at pages 522, 523 which was approved by the Privy Council in *Malayan Plant (Pte) Ltd.* v. *Moscow Narodny Bank Ltd.*[12] at page 54. It reads:

"A creditor who cannot obtain payment of his debt is entitled as between himself and the company *ex debito justitiae* to an order if he brings his case within the act. He is not bound to give time. And notwithstanding a voluntary winding-up, on proving his debt and that it remains unsatisfied he will be so entitled.

It is not a discretionary matter with the court when a debt is established, and not satisfied, to say whether the company shall be wound up or not; that is to say, if there is a valid debt established, valid both at law *and in equity.* One does not like to say positively that *no case could occur in which it would be right to refuse it,* but ordinarily speaking, it is the duty of the court to direct a winding-up." (Emphasis added.)

Mr. Subra Naicker claims that the Company has an equity against the Bank entitling it to have this petition dismissed. With respect I think we need to redefine our terms.

Standing alone the word "equity" has been defined as "that portion of remedial justice which was, formerly, exclusively administered by a Court of Equity as contra-distinguished from that portion which was formerly, exclusively administered by a Court of Common Law" (see *Stroud's* Judicial Dictionary 4th Edn. Volume II page 928). Perhaps it would be more precise to refer to a 'right in equity' (see *Stroud's, ibid* Volume 4 page 2398).

In the nature of things, such a right in equity cannot exist in a vacuum. There must be circumstances which give rise to that right.

In *Kheng Soon Finance Bhd.* v. *M.K. Retnam Holdings Sdn. Bhd.* the lender had actual knowledge of the rights of the sub-purchasers in the property which was mortgaged and what is more, it had a legal obligation to make the progress payments upon presentation of the architect's certificates.

It is difficult to see what assistance the Company can derive from *Tengku Farid bin Tunku Hussain & Ors.* v. *United Asian Bank Bhd. (supra).* There the bank had taken out a writ against the company for the principal debt and interest. Subsequently the bank sued the guarantors. It does not appear that any action had yet been taken by the bank to foreclose the charge upon the company's land. This omission did not preclude the bank from proceeding against the guarantors. Whilst the court took cognizance that the guarantor had a right in equity against the creditor if he could show that the creditor was attempting unfairly to place the whole burden of the debt upon him, the ratio of the case appears to be that the mere fact that the bank did not foreclose on its charge, could not give rise to such an equity. What should not be overlooked is the fact that the sub-purchasers of the land covered by the charge were not parties to the action, and the precise range and impact of the guarantor's equity, had matters been otherwise, did not need to be adjudicated.

None of the cases cited by Counsel for the Company supports the proposition that economic hardship in a particular case (whether brought about by bad luck or bad management) or on a nationwide scale due to recession could by itself relieve a party of the adverse consequences of a contract. Parliament may do so (see for example B.M.A. Moratorium Proclamations and the Debtor and Creditor (Occupation Period) Ordinance 1948).

Two passages from *White & Carter (Councils) Ltd.* v. *McGregor*[13] should serve to highlight the problems here: See Lord Reid at pages 430 and 431:

"The other ground would be that there is some general equitable principle or element of public policy which requires this limitation of the contractual rights of the innocent party. It may well be that, if it can be shown that a person has no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages, he ought not to be allowed to saddle the other party with an additional burden with no benefit to himself. If a party has no interest to enforce a stipulation, he cannot in general enforce it: so it might be said that, if a party has no interest to insist on a particular remedy, he ought not to be allowed to insist on it. And, just as a party is not allowed to penalise the other party by taking one course when an-

other is equally advantageous to him."

And Lord Hodgson at page 445:

"It is trite that equity will not rewrite an improvident contract when there is no disability on either side. There is no duty laid upon a party to a subsisting contract to vary it at the behest of the other party so as to deprive himself of the benefit given to him by the contract. To hold otherwise would be to introduce a novel equitable doctrine that a party was not to be held to his contract unless the court in a given instance thought it reasonable so to do. In this case it would make an action for debt a claim for a discretionary remedy. This would introduce an uncertainty into a field of contract which appears to be unsupported by authority either in English or Scottish law save for the one case upon which the Court of Session founded its opinion and which must, in my judgment, be taken to have been wrongly decided."

The judicial intervention in such cases is based not on poverty or hardship but oppression and the absence of a legitimate interest: See *Clea Shipping Corporation* v. *Bulk Oil International Ltd.*(14) The choice that is forced upon the claimant is a remedy in damages rather than a claim for full remuneration for useless work.

What the Company is seeking to here is to spike the guns of the Bank. A right in equity normally only arises if the holder of that right is said to have been induced to act to his detriment in reliance upon some representation of fact. Omissions to give notice of facts may also give rise to equitable estoppels if there is a fiduciary relationship which imposes a duty to speak up. The special legal relationship of the parties may give rise to a right in equity by waiver or acquiescence. But these features are conspicuous by their absence in this case. When the Bank took their securities in all the forms available to them, they were willingly given by the Company and its directors. If it was intended that the Bank should be limited in the simultaneous exercise of all the remedies open to it, provision should and would have been made. And as for the alleged oppression, surely it was open to the Company and its directors to approach other sources for the moneys required if it was a fact that the market value of the collateral offered far exceeded the face value of the loans.

Coming back to the present, it seems to me that whether one is dealing with a foreclosure action or a petition for winding-up, the Court is entitled to inquire into 'the existence of any cause to the contrary" as to why the land should not be sold or "any reason why the petition to wind-up should not be made" either because the debt was not valid in equity or because the circumstances were such that it would be right to refuse the application. The words may be different, but the effect is the same.

The right judicial approach has been admirably spelt out by Slade J. in *Re Camburn Petroleum Products Ltd.*(15) at page 303. He said:

"In other words a creditor in the circumstances mentioned is *prima facie* entitled to his order, and is *prima facie* not bound to give time to enable the debtor to pay. In my judgment, subject to the discretion given to it by sections 225 and 346 of the 1948 Act, to which I have already referred, the attitude of the court should be, and is, essentially unchanged today. While I recognise that it could have the right under those two sections to pay regard to the wishes of the contributories, in deciding whether or not to make a winding-up order on a creditor's petition, or to adjourn the hearing, in my judgment it can, and should, ordinarily attach little weight to the wishes of the contributories, in comparison with the weight it attaches to the wishes of any creditor, who proves both that he is unpaid and that the company is 'unable to pay its debts. A creditor giving credit to a company, after all, cannot ordinarily be expected to know of or ascertain the potential difficulties which may face the company in regard to the discharge of debts ... on account of other internal matters. He is, I think, ordinarily entitled to assume that his debt will be punctually paid by the company as and when it falls due and to exercise the remedies given to him by section 224 and the following sections of the 1948 Act if it does not ..... In my judgment a creditor in advancing money to a company, at least in the absence of notice to the contrary, is ordinarily entitled to assume that its affairs are being run in such a manner as will enable it promptly to discharge its debts when they fall due, and to say to the court, and to other persons, that internal disputes between directors and/or contributories of the company are no concern of his."

A little later Slade J. said that the court would only adjourn a petition if it was satisfied that there were exceptional circumstances that justified such a course.

In the case before me, Mr. Subra Naicker was asking the Court to dismiss the petition. If merely to adjourn a petition to wind-up in the face of objections from the creditor required exceptional circumstances, what more if the petition is to be dismissed? The right in equity in the *Kheng Soon Finance case* surpassed an equitable estoppel. There may be other cases where the Court could be persuaded that it would be right to refuse the petition because the conduct of the petitioner was so oppressive as to make the presentation of the petition an abuse of process.

But this is not such a case. Counsel for the Company based his submission simply on the ground that the Bank should have exhausted its remedies under the charges made by the Company

in its favour before the Bank filed this petition. In the light of *Bank Bumiputra Malaysia Berhad* v. *Esah binti Abdul Ghani (supra)* that submission must necessarily fail. But if all the circumstances of this case were taken into account, the view of the Court would be no different.

The third submission made by counsel for the Company was that to permit the petition to proceed would be to allow a multiplicity of proceedings which was tantamount to abuse of process. It was here submitted that the Bank had already applied to the Collector for an order of sale. On August 3, 1986, after the presentation of this petition, the Bank is said to have filed a writ against the Company and its three guarantors for payment of the debt. It was contended that by electing to foreclose and by filing the writ against the Company and the guarantors, the Bank was estopped from proceeding with the petition.

This estoppel contention, with respect, is devoid of merit. The enforcement of alternative remedies does not amount to a representation that the Bank will not resort to other remedies open to it.

To substantiate the election submission reliance was placed on *Verschures Creameries Ltd.* v. *Hull and Netherlands Steamship Co. Ltd.*[16] But the facts of that case have no application to the present case at all. There the vendor sold goods which were forwarded to the customer through a forwarding agent. On arrival of the goods at the destination, the vendor instructed the forwarding agent not to deliver to the customer. The forwarding agent nevertheless delivered. Instead of suing the forwarding agent, the vendor elected to invoice the customer and when he did not receive payment, proceeded to sue the customer and recovered judgment for the process of goods sold and delivered. Failing to get satisfaction he took bankruptcy proceedings against the customer. Thereafter he sought to sue the forwarding agent for negligence and breach of duty in delivering the goods to the customer and the court held that the vendor could not do so. The basis of the decision was that a party could not approbate and reprobate. By suing the customer in contract, the vendor had ratified the delivery and could not go back on it.

The second decision relied upon was *Benjamin Scarf* v. *Alfred George Jardine.*[17] The facts of that case are even further removed from the present. It was there held that a person who supplied goods to a partnership which subsequently went into dissolution and then reconstituted itself as a new partnership with some of the members of the old firm, had to elect whether he would sue the partners of the old firm or the new firm, in the absence of notice of the change but he could not sue both. I am unable to see what the decision has to do with the facts before me.

Counsel for the Company, in the course of his submission, sought to suggest that the Bank had acted improperly in not enforcing all its remedies earlier and especially in 1982 when the value of the property was much higher. He went on to make out that the Bank had been guilty of improper conduct by reason of its inactivity because in the meantime the interest element had caused the debt to outgrow the amount of the original loan.

Lest we arrive with Alice in Wonderland, we should perhaps remind ourselves that the onus of punctually repaying a debt and to see that it is repaid, does not lie on the shoulders of the creditor but upon the debtor. If they did not like the terms of their loan in 1982, it was for the Company and its Directors to make alternative arrangements by going somewhere else. In this case the Bank did not single out any particular guarantor for attention. They attempted to enforce all the remedies open to it, and the salient fact is that although they had knocked on every door open to them, by the date the petition was heard the debt was still unpaid.

Consequently I find no merit in any of the submissions made on behalf of the Company.

One other feature of this case must now be dealt with. Counsel for the Company says that if the petition for winding-up had not been presented and advertised, the other creditors who have now assembled to support the petition would not be in Court and their voices should therefore be disregarded.

With the greatest respect, this submission is not worthy of a moment's consideration. Many of the supporting creditors have got judgments against the Company which still remain unsatisfied. Every one of the solicitors for the supporting creditors has informed the Court that if the Bank had not presented the petition, they would have taken steps to put the Company into liquidation. One of them went so far as to submit that any payment

made by the Company to the Bank at this stage would be objected to as a fraudulent preference.

Whilst it is not necessary for me to decide this, the fact is that the evidence of commercial and actual insolvency in this case was overwhelming and I had no hesitation in making the order sought.

The Company must pay the costs of this hearing to the petitioning creditor and the supporting creditors.

Order accordingly.

Solicitors. *Ong Ban Chai & Co.; Subra Naicker & Co.*

NG CHIN SWEE & ORS. v. KOPERASI BELIA BERSATU BERHAD

[A.C.J. (Shankar J.) November 27, 1986]

[Johore Bahru – Civil Suit No. 23-975 of 1986]

Co-operative Societies – Deposit taking – Crisis of confidence – Failure to pay depositors in time – Appointment of firm to assume control and carry on business of co-operative society – Emergency (Essential Powers) Act, 1979, s. 2 – Essential (Protection of Depositors) Regulations (P.U.(A) 238), reg. 7, 8 & 9 – Essential (Protection of Depositors) Order 1986.

Practice and Procedure – Application for summary judgment – Appeal against decision of Registrar – Appeal to Judge – Dismissal of appeal – No stay of execution – R.H.C. 1980, O.14, 15 & 17.

The defendant Koperasi Belia Bersatu Berhad ("Kosatu") was registered under the Co-operative Societies Ordinance 1948 on January 17, 1977, by its founder Chairman, Tee An Chuan. Currently it has 67 operating branches located throughout Peninsula Malaysia with 14,541 members. It has 19 subsidiary companies. Deposit taking is the principal business of Kosatu. As at July 23, 1986, it has collected about $156 million from some 52,000 depositors, among whom are the 12 plaintiffs who had deposited with it $279,677.22. The plaintiffs reacted when they did not receive their money as promised on July 15, 1986.

Between May and July, 1986, there was a widespread crisis of confidence not only with regard to Kosatu but also other co-operatives in the country which did not remain unnoticed by the authorities. In exercise of the powers conferred by section 2 of the Emergency (Essential Powers) Act, 1979, the Yang di-Pertuan Agung made the Essential (Protection of Depositors) Regulations – P.U.(A) 238 ("the Regulations") which were gazetted on July 20, 1986, by order of the Finance Minister. Kosatu was a subject of a specific order made under Regulation 8 on July 23, 1986, and gazetted as the Essential (Protection of Depositors) Order 1986. On July 23, 1986, the Governor of Bank Negara in exercise of the power under Regulation 9(1)(b), appointed the firm of Ernst & Whinney to assume control and carry on the business of Kosatu with effect from July 23, 1986, until further notice. On July 30, 1986, the plaintiffs filed their writ. On August 8, 1986, the defendant entered appearance. On August 17, 1986, the plaintiffs filed their application for summary judgment. The defence of the defendant was filed on August 18, 1986.

Before the Senior Assistant Registrar, the defence was a bare denial coupled with a plea in the Bar that this action "is invalid in view of the suspension order made by the Central Bank of Malaysia." The Registrar found in favour of the plaintiffs. Kosatu appealed to the Judge.

Held, dismissing the appeal with costs: (1) there is nothing in the Essential (Protection of Depositors) Order 1986 or in the Regulations which has the effect of a moratorium which precludes third parties from filing claims against Kosatu. The action was properly filed. On the material before him, the Registrar very properly gave judgment against Kosatu;

(2) a depositor could withdraw at any time and would receive interest if the deposit had been left with Kosatu for 3 months;

(3) in the absence of an appeal, merits and special reasons, no stay of execution could be ordered.

Cases referred to:

(1) *Employers' Liability Assurance Corporation Ltd.* v. *Sedgwick Collins & Co. Ltd.* [1927] A.C. 95.
(2) *Windsor* v. *Chalcraft* [1939] 1 K.B. 279.
(3) *Atkinson* v. *The Bradford Third Equitable Benefit Building Society* (1890) 25 Q.B.D. 377.
(4) *Letchumi & Anor.* v. *Asia Insurance Co. Ltd.* [1972] 2 M.L.J. 105.
(5) *Evans* v. *Bartlam* [1937] A.C. 473.
(6) *Public Prosecutor* v. *Oie Hee Koi* [1968] 1 M.L.J. 148; [1968] A.C. 829.

APPEAL FROM REGISTRAR.

Ng Ah Ee for the plaintiffs.

Andrew T.C. Saw (*Leong Tuck Kong* with him) for the defendants.

Cyrus Das (*Romesh Abraham* with him) for the intervener.

Cur. Adv. Vult.

Shankar J.: This is an appeal by Koperasi Belia Bersatu Berhad (hereafter referred to as "Kosatu") against a summary judgment given against it in favour of the plaintiffs.

Kosatu was registered under the Co-operative Societies Ordinance 1948 on January 17, 1977, by its founder Chairman Mr. Tee An Chuan.